Plank Road – Court [illegible]

No 14.

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Supreme Court of the State of Ohio.

DECEMBER TERM, 1854.

THE TOWN COUNCIL OF THE TOWN OF NEWARK

v.

BENJAMIN ELLIOTT, GILBERT BRADY,

AND

SAMUEL WINEGARNER.

IN DEBT—*Reserved from the District Court of Licking County.*

ARGUMENT FOR PLAINTIFF.

BUCKINGHAM & WHITE,
ATTORNEYS FOR PLAINTIFF.

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ARGUMENT FOR PLAINTIFF.

This is an action upon a bond in the penal sum of $20,000 given on the 3d of May, 1851, by A. J. Smith, as principal, and the defendants as his sureties to the plaintiff, conditioned that said Smith should pay the principal and interest thereafter to become due on certain bonds that had been issued by the plaintiff. The declaration sets forth the making of the bond and the recitals contained therein, whereby it is alleged that said Smith had purchased of the plaintiff two hundred shares of fifty dollars each of the Newark Plank Road Company *at par*, and which had at even date with the bond *been transferred* to said Smith, and that in consideration *thereof*, Smith had agreed *to pay* and indemnify plaintiff against its liability to pay nine bonds given by plaintiff to the Newark Plank Road Company for $1,000 each, dated May 1, 1850, and payable *to bearer* January 1, 1860, at the office of the Ohio Life Insurance and Trust Company in New York, with seven per cent. interest, payable semi-annually; and also two hundred other bonds, for *five* dollars each, issued by plaintiff, dated May 1, 1850, and payable to bearer, part in five, part in six and part in seven years from date, with seven per cent. interest, payable an-

nually; that the interest had been paid on the nine $1,000 bonds to the first day of January, and the 200 $5 bonds to the first day of May next preceding the said sale; that all said bonds had been given by plaintiff to said Plank Road Company in payment for said stock; and that it was thereby provided that if Smith *should pay* all said bonds and the interest thereafter to become due, according to the tenor of the bonds, and should also indemnify plaintiff against its liability therefor, and against all costs, charges and troubles which might arise from his (Smith's) failure to pay, then said bond to be void, &c. The breaches are assigned in the declaration, and are the non-payment of the interest due in January and July, 1852.

To this declaration the defendants, Brady and Elliott, plead separately—Brady pleading *non est factum* and *ten* special pleas, and Elliott *non est factum* and *nine amended* special pleas, he having formerly filed the same *ten* special pleas now filed by Brady, and, after argument in the Common Pleas, withdrawn them. No defense is made by the defendant Winegarner.

Most if not all of the substantial questions in the case arise upon the amended pleas of Elliott, and they will be first considered.

Elliott's *second* plea (being his first special plea) alleges that plaintiff is the municipal authority of the town of Newark—that at the date of the bond in suit, and ever since, the Newark Plank Road Co. has been a body corporate in the county of Licking—that by an act of the General Assembly, passed March 14, 1849, plaintiff was authorized to subscribe for $10,000 of the stock of said Plank Road Co. for and on behalf of said town, provided a majority of the voters of the town should vote in favor thereof, and "to sell and transfer the stock so subscribed, so soon as it could be sold at par, or at any time after, provided it could be sold at its par value,"—that plaintiff subscribed for the $10,000 of stock, and the town became owners thereof—that plaintiff sold the stock to Smith in consideration of the bond in suit, and executed and delivered to him a paper purporting to transfer the stock, and which was apparently sufficient therefor—that plaintiff had no

power to sell for that consideration, and that therefore the bond in suit is void.

The *third* plea of Elliott is similar to the second, except that it alleges that the bond in suit was delivered by defendants to Smith to be delivered to plaintiff upon the transfer by plaintiff to Smith of the *title* to the stock—that Smith delivered the bond without having obtained the title, *because* plaintiff had no power, for such a consideration, to sell the stock.

The same question, precisely, is raised upon these two pleas. In the latter, the lawfulness of the delivery of the bond in suit, is made to depend *solely* on the power of plaintiff to sell the stock for the particular consideration, and that is the same question presented in the former plea.

The *ninth* plea of Elliott alleges that the two hundred shares of stock named in the declaration, are the same which were subscribed by plaintiff under the act of March 14, 1849—that the *par value* of the stock was fifty dollars per share, amounting to $10,000—that the *value* of the said ten thousand dollars of bonds which Smith agreed to pay was less than the said *par value* of said stock—not being worth more than ninety cents on the dollar —that therefore, plaintiff had no power to make the said sale and that the bond in suit is therefore void.

To *each* of these pleas the plaintiff demurs—for the following causes:

1. That no cause is shown why the sale is not valid.
2. That the pleas disclose a sale at par.
3. That plaintiff had authority to sell irrespective of the act of March 14, 1849.
4. That the sale was good and the bond valid, even if plaintiff did not pursue the directions of the statute.
5. That it is not averred that Smith lost or had tendered back the stock, although the declaration and plea aver that it had been delivered to him.

In considering the questions raised by these demurrers, we maintain:

First—That the sale as disclosed in these pleadings is one

strictly in conformity with the provisions of the act of March 14, 1849.

Second—That, if not conformable to the exact terms of that act, it was still a valid sale under the powers vested in plaintiff by the common law, and by her charter of 1826.

Third—That, even if the sale should be held unauthorized, the defendants must tender back the possession of the stock, or show eviction, before that defense can be made.

Much has been said in this case upon the subject of the powers of corporations, ordinary and extraordinary, and many authorities cited as though there were some dispute upon the law of the powers of corporate bodies. We think no such dispute exists—that the only difficulty is upon the application of the law to the circumstances of this case.

The act of March 14, 1849, Sec. 3, 47 Ohio Local Laws 26, provides: "That said town council are hereby authorized to sell and transfer the stock so subscribed, as soon as it can be sold at par, or at any time after, provided it can be sold at its par value." Let it be granted for the present, that these words restrict the disposition of the stock to *a sale* and *a sale at par*. Viewed in this light, the objections made to the legality of this alleged sale and transfer are:

1. That it is not a sale, but a barter or exchange.
2. That it was a sale upon credit and not for cash in hand.
3. That it was not a sale at par.

Upon the first objection we differ from the counsel for defendant upon the fact; we find in the facts no evidence of a barter or exchange—they do not show the giving of one commodity or chattel for another—the bond in suit and the declaration show that Smith had purchased the stock, and in consideration thereof, had agreed to pay $10,000 and the interest thereof, in cash, to the creditors of plaintiff, in payment of so much of plaintiff's debts. Is that what we call a barter? A merchant sells ten thousand dollars worth of goods and the purchaser agrees to pay therefor $10,000 to the creditors of the merchant—that is a sale

for cash, and so is this sale—the consideration in each is money—money to be paid, not directly to the plaintiff or the merchant, but to and for their use, and at their request.

But even if the facts made out a case of barter, we should maintain that it was authorized by the words of the statute. It is true, that where a statute directs a sale for the special purpose of raising money, the consideration to be received must be money; such are the cases of sales by sheriffs, administrators, constables, partition sales, &c. &c. But where that is not the special purpose, but the statute is one conferring a general power for the disposition of property, or a special power to dispose of a particular thing for general purposes, then the authority to sell would include a barter or exchange. The word "sale," as commonly used, has no such narrow meaning as the defendants claim. A railroad company is authorized by statute *to sell* its bonds or surplus lands; under that it may, undoubtedly, barter or exchange them. A bank is authorized by its charter to sell coin and bills of exchange; undoubtedly it may barter or exchange them for any commodity in which it is authorized to deal. We concede that, in some cases, the mere agent of the railroad company, or of the bank, might not have that power; but the corporation has it, and may lawfully exercise it. Words in common use, when found in a statute, are to be construed according to their common usage and popular signification; technical legal words and phrases, on the other hand, are to be construed in their technical sense. 2 Black. Com. 59; 7 Cow. 202. And the defendants' argument (p. 7) admits that the word "sale," in its *general* sense, is applied to every transfer of property not in the nature of a gift. Whether it be viewed, therefore, as a sale or an exchange, this transfer is equally authorized by the statute, so far as regards the first objection.

But it is further objected that the sale, though for cash, was upon a credit—that the plaintiff had no power to sell upon credit, because the plaintiff is an agent; and the narrow doctrines of agency, and the rules for construing powers of attorney, are invoked to help out this objection. But are they applicable? And,

first, who *is* the plaintiff? What is the "Town Council of the Town of Newark?" It is the town of Newark itself, in its *corporate capacity*. The town charter, in 1826, (24 Ohio Local Laws, 105) erected certain territory into a "town corporate," and vested the corporate capacity to act; the power to sue and be sued; to acquire, hold and convey property; to have a seal; to make ordinances; to levy taxes, &c., in the Town Council, and which, by sec. 4, is made a body corporate and politic, with perpetual succession, &c. There is no power vested in the town to do any one act, except it be done by the Town Council, &c. And the counsel for defendants are mistaken in saying that the town of Newark has any capacity, distinct from the Town Council, to hold property, &c. Nor is it correct to say that the principal, the town itself, acted, when a vote of the electors was taken pursuant to the act of March 14, 1849. The electors in the town are no more *the town* than the women and children are.

We maintain, then, that the plaintiff is not an agent, in the legal sense. The plaintiff, as before stated, is the town itself, in its corporate capacity, and the town is no agent. Agency is where one, competent to do an act for himself, procures another to do it for him. Story on Agency, sec. 3. The town of Newark, the corporate capacity by which alone it can act, that is, the plaintiff, acts for itself, in its own right and to accomplish its own ends—not in the right of another, nor to accomplish another's ends. True, the action should be for the good of the people of the town, not of the electors only, but of all the people; but still the people are not the principal, to whom the plaintiff is an agent. The people, or the "town," as distinct from the Town Council, could not sue or be sued, contract or be contracted with; could not buy nor sell, take nor hold property, nor make police regulations, nor levy any tax—not even if every inhabitant, every man, woman and child assembled and assented to the act. In their aggregate body they have no capacity, and, therefore, can be no principal to create an agent. The existence of a principal presupposes one capable of acting—of appointing the agent, of prescribing his powers, calling him to account, and of ratifying or

repudiating his unauthorized acts. There is no power or person that stands in that attitude to the Town Council of the Town of Newark. Undoubtedly the acts of the plaintiff must be within the uses, and in relation to the affairs, of the town; but, acting within those uses and purposes, the plaintiff is a principal, clothed with high powers over the liberty and the property of the citizen, and not fettered, as counsel for defendants would have us believe, by the narrow doctrines of common agency, nor by the technical rules for the construction of a power of attorney. If the acts of the plaintiff are within the purposes of the town, and contravene no law of the State, and are not founded in fraud, they require no ratification, and there is no power or person under the sun that can ratify or annul them.

The General Assembly of Ohio acts for the good of the people of Ohio, but its powers and authority are not measured by any of the rules of agency; the State acts and contracts as a principal.

The stockholders of a bank or a railroad company act for the corporation, but not as agents; its officers are their agents, just as the mayor, marshal, &c., are the officers and agents of plaintiff.

The State makes its sales for cash or upon credit, at par or below par, as suits its convenience, and no one doubts its right to do so. Yet the State, or the General Assembly which acts, is just as much the agent of the people of the State as the plaintiff is the agent of the people of the town of Newark. If the plaintiff had authorized its mayor or its marshal to make the sale, that would have made a case of agency, and the agent could probably only have sold for cash in hand, unless expressly authorized to sell otherwise.

In the case of *Reynolds' heirs* v. *The Commissioners of Stark County*, 5 Ohio Rep. 205, it is held that a corporation has the same capacity to purchase or to sell that an individual has, that the doctrine has been long settled and repeatedly recognized from a very early period to the present time, and that property held

by a corporation, for general corporate purposes, may be aliened for purposes not corporate, and the alienation be valid.

The plaintiff, therefore, being authorized to sell this stock for itself and for its own account as principal, and not having been restrained by statute from selling on credit, the sale disclosed in these proceedings is good as regards the *second* objection also.

But it is still further objected that this sale was not made for the par value of the stock, it being alleged, in aid of this objection, that the bonds of the town of Newark were not worth par in market at the time the stock was sold. Here again we have a question of fact. We maintain that the pleadings do disclose a sale at par. The par value of the stock is $10,000 ; the sum to be paid for it is $10,000, neither a cent more nor less; and, until that sum is paid, interest thereon at the rate of seven per cent. per annum, is to be paid semi-annually, not only from the day of sale, but for four months preceding that day, upon $9,000 of the amount; so that, in fact, the sale was for $210—above par. It must be borne in mind that this is not a case of taking the bonds of some other corporation or person in payment. It is not even the taking of plaintiff's own bonds in payment. It is a cash payment—cash to be paid to the use of plaintiff. This seems to have been overlooked in the framing of these pleas. They treat the case as if it were the taking of bonds by plaintiff in payment, and the bonds of some third party. But that is a great departure from the facts. *Par value* has reference to amount only, and relates solely to the price to be paid—not to the time of payment, mode of payment, nor to the person to whom payment is to be made. If the plaintiff is to realize a dollar in value for every dollar of stock, then the sale is at par ; and such are the facts. The plaintiff was bound to pay the full amount of the bonds it had issued, the purchaser of the stock agrees to do it for the plaintiff; that is to the plaintiff a realization of dollar for dollar. The proper inquiry is not how much the purchaser makes by his bargain, but how much the seller is to realize. Analagous questions have arisen upon pleas of usury. If the

lender puts off to the borrower bank bills, or the notes of other persons, which were at the time depreciated in his hands, and must necessarily be sold by the borrower at a loss, that is usury. But if the lender give his own note or bond for the amount, that is not usury, for he must pay the full amount of that at all events; unless, indeed, the lender give his note payable at a future day without interest, and reserving interest for the same time from the borrower; this would be usury on account of the obvious advantage in the interest.

Mumford v. *Am. Life Ins. and Trust Co.*, 4 Comst. 474.

Suppose the town of Newark, at the time of this sale, had been insolvent, and her outstanding debts were past due, but, by reason of her insolvency, worth only fifty cents on the dollar, and that in consideration of the sale of $10,000 of this stock, the purchaser had agreed to pay a certain specified debt to the amount of $10,000, who doubts but that it would be a sale at par? That the debt was in market depreciated, would make no difference; the holder of that specified debt could compel the purchaser to pay the full amount of it. A trust would be created which he could enforce by law.

We think, then, that it is established that the disposition by plaintiff, of its stock as disclosed in the pleadings, was a sale, not only in the popular, but in the strictest sense; that it was a sale for its par value; that there was ample power to give the credit, and that therefore the sale was made in strict conformity to the provisions of the act of March 14, 1849.

But we maintain further, that even if the sale was not in strict conformity to that act, it was a valid sale, under the power vested in plaintiff by the common law, and her charter of 1826. It cannot be doubted but that, apart from the provisions of sec. 3, of the act aforesaid, plaintiff might lawfully dispose of any of its property which it deemed judicious to part with; and that it might dispose of it by sale or exchange—by sale at any price it might deem proper, and upon credit—that it had the same powers for that purpose as an individual.

Reynolds' Heirs v. *Stark Co.*, 5 Ohio 205.

Angell & Ames on Corporations. Sec. 145 (4th edition.)
2 Kent's Com. 281.
4 Com. Dig. 256, ib. 260.
Barry v. *Merch. Ex. Co.*, 1 Sandf. C. R. 280.

It is conceded that there is no restriction upon plaintiff, unless it is contained in the act of March 14, 1849, Sec. 3—the words of which section have already been given. They are words of permission only—they do not profess to restrict or limit plaintiff as to any powers already enjoyed, and words of mere permission or affirmation in a statute do not take away a custom, much less do they take away a common law right.

Smith's Com. on Constr., Secs. 660, 682.

Indeed the words of the section in question, taken literally, do not say for what price a sale may be made, but only when it may be made. Still, the implication is strong that plaintiff was *directed* to sell at par—but it is only a *direction*, and that, too, by implication only—the plaintiff is not commanded to sell at par, nor prohibited from selling at less than par. Indeed, if any prohibition can be inferred from those words, it is as much a prohibition against selling at a price above par as at one below par. If plaintiff is limited at all, it must be from any variation from the price fixed by the statute—if plaintiff might vary at all, it could be as well in one direction as another. We conclude, therefore, that an interpretation that leads to so absurd consequences, is to be discarded. If the statute had enacted that all sales of the stock made at a price below par, should be void, it would have been something more than directory. It is unnecessary to cite authorities to show that a failure to pursue the terms of a directory statute does not invalidate the act done, even in the case of a corporation. The courts of Ohio have gone even farther than that.

In the case of the *Bank of Chillicothe* v. *The town of Chillicothe*, 7 Ohio Rep. pt. 2d, p. 31, it was held, that if the act done by the town was one which might and would ordinarily have been proper in order to accomplish any legitimate town purpose, the act would be valid and binding, even though it was improperly done, and done to effect a purpose they had no power to accom-

plish. It would be a question only between the State and the Town, or the town and the particular officers who did the act. It has already been seen also, that a corporation may alienate its property for purposes not corporate, and the alienation still be valid.

In the case before cited from 5th Ohio Rep. the Court say that so necessarily incidental is the power to alienate, "that it has been holden that a corporation cannot be created, possessing the power of holding, without the power of disposing; and that a clause in the charter, restricting the alienation of property, without the consent of the chancellor, is void." We may then safely conclude that such restrictions, even if made, are but directory, and never to be considered as limitations of power.

We come, then, to the consideration of our *third* proposition, to wit: *That even if the sale should be held unauthorized, the stock must be tendered back, or an eviction have taken place, before that defense can be made.* The pleadings disclose the fact that possession of the stock was given to the purchaser. He has the property of the plaintiff delivered to him on his promise to pay the price. He holds on to the possession—says he has not been clothed with the title, and refuses to pay. It would be strange, indeed, if the law permitted that. Let it be granted, that in sales of personal property, the implied warranty is one of title and not merely against eviction—that does not reach this case. The implied warranty of title is, that the *seller's* title was good (Parsons on Contr. 458, note)—that warranty is not broken, for the title of plaintiff is not questioned. The cases put by counsel for defendent are not then in point—they are cases where the seller had no title and the purchaser stood liable to the real owner. In such cases, and in cases where the thing delivered had no value, there is some propriety in holding that the purchaser need not restore possession before he can defend against a suit for the price. In the one case it is giving possession to a wrongdoer, who is not entitled to it, and in the other, there is nothing, in fact, to restore.

In Vibbart & Abbott v. *Johnson*, 19 Johns. R. 78, the action was for the price of tea sold by plaintiffs to defendant—the defendant offered to prove that the tea was the absolute property of

a third person—that plaintiffs knew it, and that defendant had paid such third person for the tea—the court below rejected the evidence, and the Supreme Court affirmed the decision, holding that the title of a third person could not be set up unless there had been an eviction or something equivalent.

Defreeze v. *Trumper*, 1 Johns. R. 274, was an action to recover the price of a horse sold and delivered by plaintiff to defendent; the defense made was that the horse belonged to a third person, *who had by suit recovered from the defendant the price*, and the defense was sustained. There was an equivalent to eviction.

Rew v. *Barber*, 3 Cow. R. 272, was an action to recover back the price paid for a horse, the title had failed, and *there had been an eviction.* The plaintiff recovered.

Dresser v. *Ainsworth*, 9 Barb. R. 619, 626, was an action upon a note given by defendant to plaintiff on the purchase of certain chattels. The defense was failure of title, and eviction under the paramount title. The defense was sustained, and the eviction was considered by the court (p. 626) as a necessary element in making it out.

We find no authorities that conflict with these. The defendants cite none, and we may safely conclude that none such exist. The position is still further strengthened by the analogy to the covenant of warranty on the sale of realty.

The plaintiff, then, having been the true owner of the stock, is entitled to either the possession or the price; and there is neither conscience, reason or authority for permitting the purchaser to hold on to the possession, and at the same time defend an action for the price.

But, say the defendants, however correct that may be as an objection to the other pleas, it is not good as to the *third*—that there is a difference between a contract to sell *a chattel*, and a contract to sell *the title to it*—that the *third* plea shows that the bond in suit was made and put into the hands of Smith as an escrow, to be delivered to plaintiff upon the plaintiff's giving Smith *title* to the stock, and that, therefore, unless Smith got the title,

the bond was improperly delivered. A careful examination of this plea will show, we think, that such is not its true construction, and that it differs in no essential matter from the *second* plea. Said third plea avers that plaintiff agreed to sell and transfer to Smith the title to the stock, in consideration that Smith, with defendants as his sureties, would execute to plaintiff a bond like (in all respects) the bond in suit—that that agreement was made known to defendants, and that they signed the bond and placed it in Smith's hands, to be delivered by him to plaintiff, "*upon the terms and agreement so entered into between him and plaintiff*," not upon the condition that plaintiff should first *execute* its part of the agreement, but simply *upon the agreement.* Now, what was the agreement *so entered into?*—just what the plea itself has stated—that plaintiff, for that particular consideration, should sell and transfer. There is no allegation that Smith delivered the bond for or upon any other agreement. And for that reason the plea is clearly defective, if it is to be regarded, as the defendants claim it, as a plea of the wrongful delivery of an escrow. The plea, then, can only be construed as one showing a failure of consideration, and equally with the second and ninth, defective for not alleging a return or an eviction of the stock.

The *fourth* plea of Elliot avers that the person who acted *as agent* for the plaintiff, in effecting the transfer, was not authorized. This plea is defective, because the declaration shows that the *transfer* was ratified by the plaintiff, and the question of authority in the agent is, therefore, an immaterial issue. It is also defective in not alleging a restoration or eviction of the stock.

It may be proper to remark, upon this and the other three pleas already discussed, that each of them avers that the title to the stock did not pass by the sale and transfer, and that it may be claimed that the demurrer admits that averment to be true, and that as the passing of title was the consideration of the bond in suit, it is void. We answer that each plea admits that the plaintiff undertook to transfer the stock, and then avers and puts on the record the facts from which it is claimed that the title did not pass; that the title did not pass is made to depend upon the reasons given.

The demurrer admits the existence of the facts, but not the inferences incorrectly drawn from them.

The *fifth* plea of Elliot alleges that the plaintiff made the two hundred bonds, of five dollars each, named in the declaration, and put the same in circulation as money and currency, without authority of law, and contrary to the restraining act of 1845.

The *sixth* is the same, except that it alleges an *attempt* to put in circulation instead of an actual putting in circulation.

The *seventh* alleges that plaintiff made said five dollar bonds in the similitude of Bank notes, and that the purpose and design of plaintiff, and of the Plank Road Company to whom they were paid, in having them so made, was that the said Plank Road Co. might put the same in circulation as money and currency, and that said Company did afterwards *attempt to* circulate them.

These pleas are also demurred to, and for the following causes.

First: That the bond in suit is wholly disconnected from the illegal act set forth, founded on distinct considerations, and not intended or calculated to carry out any illegal purpose.

Second: That even if the five dollar bonds were put, or attempted to be put in circulation, contrary to the restraining act of 1845, still plaintiff is bound to pay them, and might lawfully provide therefor.

Third: That the defendants, being *third* persons and *strangers* to the alleged illegal transaction, can not set it up as a defense to their contract.

Fourth: That the pleas do not disclose a defense to the whole bond in suit, if they do to any part of it; and do not at all answer the breaches set forth in the declaration.

In the discussion of the first objection to these pleas, we find ourselves relying on the same general doctrine with defendants, as stated in *Gray* v. *Hook*, 4 Comst. R. 459, "that the distinction between a void and valid new contract, in relation to the subject matter of a former illegal one, depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract;" or, as stated in *Toler* v. *Arm-*

strong, 4 Wash. R. 299: "The principle of the rule is, that no man ought to be heard in a court of justice who seeks to enforce a contract founded on, or arising out of, moral or political turpitude. The rule itself has sometimes been carried to inconvenient lengths; the difficulty being, not in any unsoundness of the rule itself, but in its fitness to the particular cases to which it has been applied." "After the act has been *accomplished*, no new contract ought to be affected by it." In the same case, upon error in the Supreme Court of the U. States, these general doctrines are affirmed.

What, then, is the case made in these pleas? In May, 1850, the plaintiff issues her bonds, in the sum of five dollars each, and puts them, or attempts to put them, in circulation as money; or, as set forth in the *seventh* plea, made them with the purpose of aiding, not the defendants or any party to the present contract, but the Newark Plank Road Company, to put them in circulation as money. After they had been put in circulation, and a year after plaintiff had made them, a fund is placed in Smith's hands, and in consideration thereof he agrees to pay those bonds. Is there any thing illegal in that? Does it tend, or is it designed to carry out any illegal purpose? We maintain not. Let it be borne in mind that there is no allegation that this fund was placed in Smith's hands, or this sale made to him, to aid or assist the illegal purpose; that the making and putting in circulation the five dollar bonds, was a transaction in no manner connected with the bond in suit—was completed a full year before; that the bond in suit is upon a distinct and entirely different consideration, and that the defendants and said Smith are in no way parties to, or interested in, the illegal transaction. How, then, can the bond in suit be tainted?

The restraining act of 1845 prohibits "*the making and putting in circulation*," "*the making and attempting to put in circulation*," and "*the assisting to make and put in circulation*," as money or currency, any note, &c. It is the use to be made of the paper that is prohibited and made unlawful; the simple act of making the bonds is not illegal, nor is the selling them, nor the

borrowing of money upon them, nor the paying of them, made illegal. Whatever illegal act was intended by plaintiff, in the making of the five dollar bonds, was accomplished long before the making of the bond in suit. There was nothing, no part of the illegal act, remaining to be done. The making and putting in circulation (5th plea), the making and attempting to put in circulation (6th plea), and the making them in a particular form to assist the plank road company to put in circulation (7th plea), were each and all fully done long prior to the sale to Smith and the giving of the bond in suit; and this bond and sale could not assist or tend to carry out an illegal purpose, which was already accomplished. This brings the case precisely within the class of valid contracts, under the principles laid down and already cited from *Gray* v. *Hook*, and *Toler* v. *Armstrong*.

If the kind of bonds issued by the plaintiff had been prohibited by the act of 1845; if the illegal act had consisted in the making of the bonds, rather than in the intent and use to be made of them; or if the act had declared them void, it would still be questionable whether the plaintiff could not have taken an agreement from defendants to pay them. Even then the new agreement would not have been one intended and calculated to carry out an illegal act; for it would not have been the paying, but the making of the debt, that was prohibited. As between the original parties to the illegal transaction, such an agreement might be void, but it is doubtful whether a stranger could make the defense.

In *Faikney* v. *Reynous*, 4 Burr. 2069, the plaintiff and one Richardson were jointly concerned in certain contracts prohibited by law, on which a loss was sustained, the whole of which was paid by plaintiff, and a bond was given to secure the repayment of Richardson's share of the loss. To a suit on the bond, the defendants pleaded the statute which prohibited the original transactions, and on demurrer thereto the court held that the plaintiff was entitled to recover.

In *Petrie et al.*, *Ex'rs of Keeble*, v. *Hannay*, 3 Term R. 418, Keeble, with the defendant and others, had been engaged in stock

transactions which were prohibited by law, and on which losses had been sustained and paid by their broker. Keeble repaid the broker all but a sum for which he drew a bill on defendant—it being part of defendant's share of the loss. The defendant accepted the bill, but not paying it, the bill was paid by Keeble, and his executors brought this suit to recover the money; and it was held that they could maintain the action. The decision was upon the ground that the illegal transactions were complete, and that a new security had been given.

A contract to indemnify against an illegal act to be done is void, but a contract to indemnify against an illegal act already done is valid.

Given v. *Driggs*, 1 Caines 460.

Doty v. *Wilson*, 14 Johns. R. 378.

These cases involve the same principle as the cases of *Faikney* v. *Reynous* and *Petrie et al.* v. *Hannay*, and establish the validity of contracts to make good losses sustained upon illegal transactions then fully completed. The bond in suit here is further removed from the illegal acts than those contracts were.

But there is another principle of law which is fatal to the validity of these pleas. Where a stranger to the illegal transaction after its completion, receives funds or property, in consideration of which he agrees to pay a debt, which, as between the original parties was void for illegality, such third person cannot set up the illegality of the original debt to avoid a suit on his express promise.

Farmer v. *Russel*, 1 Bos. & P. 296.

Tenant v. *Elliot*, ib. 3.

Stoney v. *The Am. Life Ins. Co.*, 11 Paige 635.

Wells v. *Chapman*, 13 Barb. 561.

Sands v. *Church*, 2 Seld. 347.

2 Kent's Com. 467.

Again we maintain, that even if the five dollar bonds were issued in violation of the restraining law, still plaintiff is bound to pay them, and if she is bound to pay, she may use any lawful

means to provide for their payment. We have already seen that the act of 1845 does not make the bonds void, does not prohibit the making of such bonds, but only a particular use of them, leaving the contract contained in the bonds to be obligatory; not denying to the holder the right to sue and recover upon them, and much less making it unlawful for the maker to pay them. Since the decision in *Johnson* v. *Bently et al.*, 16 Ohio Rep. 97, we think it may be regarded as settled in this State, that notes issued in violation of a restraining law of the State are not void, unless the statute expressly makes them so. And if a note or bond which the legislature declared "should be holden and taken in all courts as absolutely void," was nevertheless valid, and, upon the removal of that restriction in the courts, might be recovered upon, then much more will the law not forbid the present plaintiff from paying these bonds, nor compel the town of Newark against her consent, and against the wishes of her people, who have never complained, but upon the suggestion only of a stranger, to become a repudiator, and forfeit forever her fair name and credit.

We come then to the last objection to these pleas, *that they do not disclose a defense to the whole bond in suit, and do not at all answer the breaches set forth in the declaration.* Conceding for the purposes of this argument, that the five dollar bonds are void, what then is the case made on these pleas? That Smith in consideration of this sale agrees to pay certain claims which consist of two classes, one legal, the other illegal—the two kinds of claims being in no way connected or blended together, but evidenced by separate securities, and each for certain and specific amounts—the legal class amounting to nine thousand dollars and the illegal class to one thousand dollars. It is, we think, a sufficient answer to these pleas to say, that the mere agreement to pay an illegal demand is not *a tainted* contract; it may be a *void* agreement, but certainly there is no *taint* of illegality in it, and if not, then surely it cannot infect stipulations contained in the same instrument to do other things; but we need not stop at that, for even if Smith's agreement to pay those five dollar bonds had a taint of

illegality, it would not vitiate the other stipulations on Smith's part. If the condition of a bond contain several stipulations, a part of which are legal and a part illegal, the bond is good and obligatory for the former—and even if the condition of a bond be entire, yet comprehending several matters of which part are legal and part illegal, the bond is obligatory as to the legal part.

State of Ohio v. *Findley*, 10 Ohio R. 51.

Chittey on Cont. (5th Am. Ed.) 693.

2 Kent's Com. 467.

Story on Contr. Sec. 627.

1 Parsons on Contr. 380.

The law upon this point is too well settled to be argued.

There remains only the *eighth* plea of Elliot to be considered. It alleges that the nine bonds for one thousand dollars each, mentioned in the declaration, were issued by plaintiff under the authority conferred by the second section of the act of March 14, 1849, which provided that plaintiff might subscribe to the stock and pay therefor by issuing its bonds bearing seven per cent. interest, payable annually, whereas the bonds are in fact made to bear that rate of interest payable semi-annually.

This plea is also demurred to, and for the following causes:

First—That the facts set forth do not show the bonds to be void.

Second—That if void in their inception they would be valid in the hands of innocent holders, and plaintiff might provide for their payment.

Third—That no third person can collaterally set up their invalidity.

As disclosed in this plea, the purpose for which the bonds were issued was legal, and the only objection to them is that the interest upon them was made payable semi-annually instead of annually. The plaintiff having been authorized to subscribe an amount of stock to the Newark Plank Road Co., might, unless restricted by the act of 1849, contract to pay the debt incurred by such subscription in any way that is customary, or that an individual

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would take: might use the same means and form that it could use in any of its other payments. It is well settled that in the prosecution of the business authorized by its charter, a corporation may make such contracts and use such means as are customarily made or used by individuals.

Ang. & Ames on Corp. (4th Ed.) Secs. 257, 271.

The plaintiff, then, having contracted a debt, by the subscription for this stock, might give its negotiable notes or bonds in payment thereof. But it is said that the act of 1849 limited the powers of plaintiff, as to the form in which it should make payment for the stock—but is it so? The first section of that act authorizes the town in its corporate capacity, to subscribe for the stock, and says—"And the town council of the town of Newark are hereby empowered to issue bonds in payment of the stock so subscribed; payable at such times as said council may deem expedient, not exceeding ten years, and for such amounts as said council may, in its discretion, determine for each bond." Here is a full and complete power granted in this act, for making these bonds in question, with no limitation as to rate of interest, or the frequency of its payment. So far as special authority was necessary, this is the section which confers it, and the grant is ample; nothing further was needed to complete it. But let its terms be understood. It does not command plaintiff to issue bonds, nor does it prohibit anything except that the bonds, if issued, shall not run more than 10 years. Being merely a grant of power, and permissive, it does not prevent the plaintiff from paying in cash, or in any property it may have, or limit in any respect, but the one mentioned, its general powers. The second section of the act then, provides for taking the vote of the legal voters of the town upon the question of subscribing, and then says—"And if, on the counting of said ballots, a majority be found in favor of the same, the said town council shall make said subscription, as provided in the first section of this act, and shall cause bonds bearing interest, payable annually, at the rate of seven per cent. per annum, to be issued and signed by the Mayor, and countersigned by the Recorder,

for an aggregate sum equal to said subscription." This provision, or rather these provisions, we understand to be merely directory; they contain no grant of power, for that was fully given in the former section, and we cannot for a moment suppose that the legislative intent was, that bonds so made, and no other, should be valid. If it is a command as to the form of the bonds, it is a command, also, that the payment shall be made in bonds, and in no other way; and that the whole sum shall be so paid—that the bonds shall bear interest—that they shall bear that particular interest and no other—that they shall be signed by the Mayor and countersigned by the Recorder, and that a variation in any, the least particular, should make the whole thing void. We think the legislature never intended such consequences. If the plaintiff had money in its treasury unappropriated, would it have been unlawful to have applied a portion of it to the payment of the subscription, or, if the subscription had been partly paid for in cash, does any one believe that the bonds issued to pay for the remainder would have been illegal and void, merely because they were not "for an aggregate sum equal to said subscription?" If plaintiff had deemed bonds bearing a less rate of interest to be more expedient, would they not have been valid? It cannot be supposed that the legislature intended to circumscribe the powers of plaintiff within limits so narrow, and especially so, when there seems to be no great principle or public good to be subserved thereby. Those requirements, not being of the essence of the thing to be done, but matters more of form than substance, they are directory, and being so, no third person can take advantage of the deviation, although it be a corporation that has deviated from a direction of its charter.

Bank of Ky. v. *Schuylkill Bk.*, 1 Pars. Eq. Cas. 231.
Bank U. S. v. *Dandridge*, 12 Wheat. 64, 86.
Smith's Com. on Constr. 782—796.
Ang. & Ames on Corp. (4th ed.) Sec. 254.

In the case of the *Bank of Kentucky* v. *Schuylkill Bank*, which was a well considered case, it was claimed that the charter of the Bank of Kentucky required new certificates of stock,

issued upon the surrender of old ones, to be issued solely by the principal bank at Louisville. The bank had undertaken to create an agency in Pennsylvania to issue such new certificates, and they had been issued by said agency. The court held that the clause in the charter, as to their issue, was only directory; that the certificates were good, or at least that third persons could not set up their invalidity on that ground.

In the case of the *Morris Canal and Banking Co.* v. *Van Vorst*, 1 New Jersey R. 100, it was held that the part of the charter of the Company, which directs its banking house to be situate, and its banking business to be done, at Jersey City, is directory only.

But even if the bonds would be void in the hands of the original holder, they would be valid in the hands of a subsequent innocent purchaser. On their face they would seem to be proper and lawful contracts of the town, and they are payable to bearer. The negotiability of such paper we do not intend to discuss in this year of Grace, 1855. And we find it well settled that negotiable securities, issued by a corporation, regular on their face, are valid in the hands of a bona fide holder, though issued without authority, *and in violation even of the laws of the State. Stoney* v. *The Am. Life Ins. Co.*, 11 Paige 635; *State of Illinois* v. *Delafield*, 8 Paige, 533; same case, 26 Wend. 219; Ang. & Ames on Corp. (4th ed.) sec. 268.

The case cited by defendants from 3 Comst. 430, does not conflict with these authorities. In that case, all the rights of the plaintiff as a bona fide holder, were expressly waived; and the bill of exchange sued on was made by the corporation of the city of New York to pay penalties which had been incurred and legally adjudged against certain of its officers for misconduct in office—a bold defiance of the policy of the law that imposed the penalties, which it was well to defeat.

But, say defendants, it does not appear but that these bonds are still in the hands of the original holder. We answer, that before defendants can set up the original invalidity of a negotiable security issued by us and outstanding, and to pay which we

have put a fund into their hands, they must aver and show on their part, that the securities are in hands to which that defense can apply.

But defendants say further, that it is not material in whose hands they are, for, on their face, they show that they were issued by a municipal corporation, and whoever takes them, has or must take notice that they were issued by a limited agent. We answer that a stranger would not be bound to know, and even might not have the means of ascertaining, for what purpose they were issued. And must the consideration of every obligation issued by any corporation be inquired into before a man dare receive it? That question is sufficiently and satisfactorily answered by the authorities heretofore cited. The power in the plaintiff to levy a tax for the payment of such securities, would seem to depend upon the obligation to pay them, and that has been sufficiently argued, and, we claim, satisfactorily shown.

The numerous defenses interposed by the defendant, and the variety of questions arising thereon, have already compelled us to a longer argument than we would ordinarily indulge in; but the happy faculty of the different counsel in inventing defenses, makes it necessary to transgress a little farther in noticing some of the pleas of the defendant Brady: The first of these is *non est factum;* the *second* is in substance the same as the second plea of Elliott, except that, in addition to the defects of that, it is also *double*, as stated in the causes of demurrer thereto. The *third*, *fourth* and *fifth* are defective, for the same reasons as the *fourth* plea of Elliott, and indeed have never been seriously insisted upon in argument. The *sixth* and *seventh* are the same as the fifth and sixth of Elliott, as already discussed. The *eighth* is like the seventh of Elliott, except that it alleges the unlawful *intent and act* to have been only on the part of the Plank Road Company, and therefore, if possible, still more defective. The *ninth* we propose to discuss as briefly as possible hereafter. The *tenth* is a plea of *non damnificatus*: that plaintiff has not been injured and "*perhaps*" never will be: that *non damnificatus* is

not a good plea to an action upon a bond the condition of which is that the defendant shall pay, see

Mann v. *Eckford's Ex'rs*, 15 Wend. 502.

Sedgw. on Dams., 304–311.

The *eleventh* is like the eighth of Elliott, as already considered.

It was the *ninth* of Brady's pleas upon which stress was laid in the argument in the Common Pleas, and the only one which we have any reason to suppose will be urged upon our consideration here—indeed we do not know that *it* will be. This plea alleges that the sole consideration of the bond in suit was the *sale* to Smith of the stock aforesaid; that the sole *intention of Smith*, who already owned most of the stock, in making the purchase, was to obtain the control of the Newark Plank Road Company, and under pretense of its powers to act illegally as a bank, and issue and put in circulation as money notes payable to bearer, &c.; that at the time of the *transfer* of the stock, plaintiff knew of such illegal design of Smith, and made the *transfer* to enable Smith to effect the same, and that, after obtaining control, Smith did issue, &c.

The first objection to this plea is, that the illegal act as alleged, is one altogether too remote from the sale to vitiate it; the sale of the stock was a lawful thing, the desire of Smith to obtain control of a corporation was also lawful, and that Smith had some ulterior unlawful purpose is, we think, immaterial.

Second—We think the connection between plaintiff and the illegal act as alleged, is not such as to vitiate the contract. The illegal act and the intention to commit it, are alleged in Smith alone. Knowledge of the illegal purpose is charged upon the plaintiff, and that the *transfer* was made to enable Smith to effect it; that we do not think sufficient to vitiate the sale.

In every illegal contract either the consideration must be illegal or the act done or to be done must be illegal. Of the first class are notes given for shingles of unlawful dimensions, or for lottery tickets, or for the proceeds of slave trading; of the second class are contracts made on Sunday, or for the sale of goods for smuggling, or in violation of non-intercourse acts, and the nine-pin alley

case in Ohio Reports. To this class also belong those cases where notes, &c., given on sales of goods or loans of money have been held void, because such sales or loans were made for the express purpose of enabling a party to violate some statute or the common law; but the mere fact that the seller or lender knows that the goods or money will be applied to an illegal purpose, will not bar him from recovering the price: *he must in some way be implicated in or privy to the illegal act.*

Story on Contr. Sects. 624, 625.

Chitty on Contr. p. 418, (5th Am. Ed.)

Biggs v. *Lawrence*, 3 Term R. 453.

Clugas v. *Penaluna*, 4 ib. 466.

Wagnell v. *Read*, 5 ib. 598.

Holman v. *Johnson*, Cowp. R.

Hodson v. *Temple*, 1 Taunt. 182.

Pellicat v. *Angell*, 2 Cromp. M. & R. 311.

In the three cases cited from Term Reports, actions were brought to recover the price of goods sold to be smuggled into England; the plaintiffs were not permitted to recover, because the goods in each case had been packed in a particular way by the plaintiff so as to assist the smuggling, and the decisions are put upon the ground of *participation* by plaintiff in the smuggling.

In *Holman* v. *Johnson* and *Hodson* v. *Temple* the sales were held good and the price recoverable, although the seller knew the articles sold were to be used for an illegal purpose, no participation in effecting the purpose being shown. In *Pellicat* v. *Angell* the doctrine of these old cases is fully considered anew and fully reäffirmed; and in the text books cited, such is said to be the result of the American authorities.

The opinion of Ch. J. Eyre in *Lightfoot* v. *Tenant*, 1 Bos. & Pul. 551, is quoted in the books as one going farthest to annul contracts which have for their object the attainment of an illegal purpose; but that plea presented a case much stronger than this one. It was special, and is set out in the report; it alleged that *before* the making of the bond in suit, it was unlawfully agreed by and

between the plaintiff and defendant, that the plaintiff should sell and deliver to defendant goods to be shipped, &c., (setting out the illegal object) and to be sold clandestinely, &c.; that in pursuance of the unlawful agreement plaintiff well knowing the object did sell, &c., in order that the same might be shipped, &c., (the illegal object,) making plaintiff a party to and having a share in the illegal transaction; the violation of the law and the clandestine sale are made a part of the bargain; and the court hold that if it had been merely alleged that plaintiff made the sale *to enable* defendant to trade clandestinely, &c., the plea would have been bad. "Upon this plea (page 557) the plaintiffs do not merely assist another, they must be taken to be principals in the illicit transaction. But if the plea had been that the plaintiffs had sold these goods to defendant for the purpose of enabling him to trade with them clandestinely, that would have been a case of assistance within the authorities cited," viz: the cases already named from Term Reports.

So in the nine-pin alley case, 6 Ohio Rep. 442, the carpenter was held to be *particeps criminis*, because he not only knew that the building he was erecting was to be used for an illegal purpose, but it was constructed by him in a particular manner, in order to effect that purpose.

If this plea instead of simply alleging that Smith had an illegal object in view, had alleged that before or at the time of the execution of this bond now in suit, it was unlawfully agreed by and between the plaintiff and Smith, that Smith should act illegally as a bank, and issue notes, &c., clandestinely, and that the *sale* as well as the transfer was made in pursuance of such agreement and to enable Smith, &c., the plea would have been good within the principle established. The pleader here has been careful not to allege any such agreement, and careful too, to allege that plaintiff's knowledge of the illegal purpose existed not at the time of the sale, but at the time of the delivery of the stock only; the contract between plaintiff and Smith might have been complete long prior to any notice of Smith's purpose.

A further objection to this plea is, that although it is alleged

that the sale was made to enable Smith to effect an illegal purpose, yet in fact it was *impossible* that the sale could render such aid. The plea admits that, before the sale, Smith and his associates owned most of the stock—they, therefore, already had the control for all ordinary purposes; the illegal banking was, the plea says, to be carried on by issuing notes under cover of the second section of the amendment to the charter of the Plank Road Co., passed March 10th, 1851, (49 Ohio Local Laws, 415,) which requires all the directors to be present when an order for issuing notes should be passed, and that a majority should vote for such order. Under that provision it is not possible to imagine how the sale of this stock should aid Smith. It is said that *by possibility*, a member of the town council might have been a director, and by absenting himself from the meetings, prevented the making of an order to issue, &c. But by the fifth sec. of the company's charter, none but a stockholder can be a director, and only so long as he continues to be a stockholder. The town of Newark could not be a director, nor any member of the council, by virtue of the town's stock, for he would not be a stockholder. If he was a stockholder in his own right, the sale of the town's stock could not oust him of his office, and in that way could not have aided Smith in controlling the company. This is the only way in which it is pretended that the sale could aid Smith, and clearly in this way it could not be done; the express averment in the plea does not help the matter as long as the aid was impossible. See the opinion of Ch. J. Eyre, 1 Bos. & Pul., already referred to.

But not only did the sale not aid Smith, but it must have put that entirely out of the power of plaintiff, as plaintiff retained no voice or interest in the company.

Another objection is, that the kind of banking which it is alleged Smith intended to carry on, was not, in fact, illegal—the pleader says it was to "*issue and put in circulation, &c.*" The illegal banking, by the statute, was "*making* and putting in circulation;" issuing may be a very different thing from making, and among the ten different shades of meaning of the

word "issue," found in Webster's Dictionary, not one includes the idea of making. For aught that appears, then, Smith may have intended to issue the notes of the State Bank of Ohio, an act lawful enough.

We have now discussed the merits of all these pleas, stating such reasons as occurred to us why we deem them insufficient. The cause and our client's good name are now submitted to the determination of the court, and we trust that the plaintiff will not be made an unwilling repudiator, upon any doubtful principle, but that she will be permitted and the defendants be compelled to perform the several obligations into which they have solemnly entered.

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